conditions which the solicitors might properly insert in the contract, apart from repeating the substance of the *pro forma* itself, were limited to the implementation of the obligations imposed upon the developer by the rules. Once it is decided that the promise to purchase was not subject to contract the obligation of Clause 1 is to sign a contract of sale which implements a sale for which agreement has already been made. But the question of what may properly be included in the contract of sale can be left for judicial decision, if occasion should arise.

In the result, therefore, in their Lordships' view the *pro forma* cannot be construed so as to treat its terms as contractually ineffective until some further agreement had been made by the parties. Nor can it properly be said that the agreement contained in the *pro forma* was inchoate for want of consensual definition of the terms and conditions to be inserted in the contract of sale. Their Lordships are therefore of opinion that both the first and second submissions of the appellant should be rejected.

The dispute between the parties arose before the agreement for sale had been tendered to the respondent for signature. Having regard to what their Lordships have decided it would be proper to order specific performance of the *pro forma* even though that involves the readiness and willingness of the respondent to sign an agreement for sale conforming to the *pro forma* properly understood.

The appellant's third submission is in their Lordships' view unarguable. To treat the *pro forma* as a source of legal obligation and at the same time to deny the contractual force of the express agreement to purchase and its concomitant agreement to sell, treating its terms as doing no more than giving the respondent the right of refusal, leaving with the appellant the option whether or no to offer the property for sale at all, does more than violence to the language of the *pro forma*. If the appellant did not wish to become bound to the respondent from the outset, a document radically different from the *pro forma* would be necessary. Having regard to the terms of the rules it might indeed be difficult, if not impossible, to devise a document which provided for payment of a booking fee and at the same time left the developer with an option to offer or not offer the property for purchase to the person who had paid the booking fee. The definition of a "booking fee" in the rules cannot in this respect be overlooked.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that for these reasons these appeals should be dismissed with costs.

Appeals dismissed.

Solicitors: *Coward Chance; Charles Russell & Co.*

COSMIC INSURANCE CORPN. LTD. v. KHOO CHIANG POH

[P.C. (Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill & Sir Garfield Barwick) July 10 & October 15, 1980]

[Privy Council Appeal No. 13 of 1979]

Companies — Pre-incorporation Contract — Whether ratified by resolution of company — Companies Act (Cap. 185), s. 35(1).

This was an appeal from the decision of the Court of Appeal, Singapore reported in [1978] 1 M.L.J. 3. The learned trial judge in this case was asked to determine two preliminary questions as a matter of law. The first was whether a letter signed by twelve persons including the respondent constituted a pre-incorporation contract between the respondent and the eleven persons as agents for the appellant company which was subsequently incorporated, under which the respondent was constituted Managing Director for life. The second was whether if that letter constituted such a contract, the said contract was ratified by resolutions of the appellant's directors. The learned trial judge answered both questions in the negative but on appeal the Court of Appeal held that the substance of the said letter fell within the ambit of section 35(1) of the Companies Act and that there was a pre-incorporation contract which was duly ratified by the resolution of the directors. The appellant appealed.

Held, dismissing the appeal: that the letter fell within the provisions of section 35(1) of the Companies Act and the pre-incorporation contract was subsequently ratified by the resolution of the directors.

Case referred to:-

(1) *Kelner* v. *Baxter* (1866) 2 C.P. 174.

PRIVY COUNCIL APPEAL FROM SINGAPORE.

Christopher Clarke for the appellants.

Respondent *ex parte*.

Cur. Adv. Vult.

Lord Roskill (delivering the judgment of the Board): This appeal is brought from a judgment of the Court of Appeal in Singapore (Chua, Choor Singh and Rajah JJ.) dated July 20, 1977, leave to appeal having been granted by that court on October 13, 1977. By their judgment the Court of Appeal allowed an appeal by the respondent from a judgment of the High Court of Singapore, Kulasekaram J. dated February 25, 1976 in favour of the appellants. The respondent as plaintiff had brought an action against the appellants as defendants in the High Court for damages for breach of an alleged contract of service as managing director of the appellants, claimed to have been in writing and dated August 15, 1971. That alleged contract was said to have been contained in a letter which the appellants admitted had been sent to H. T. Sam & Co., a firm of advocates and solicitors in Singapore dated August 15, 1971 and signed by the twelve promoters of the appellants, of whom the respondent was one. The respondent claimed that by that letter the appellants agreed in writing to appoint him as their managing director for life. The appellants by their defence pleaded, *inter alia*, that if, which they did not accept, that letter amounted to such an agreement, it was not binding upon them since those promoters were not and could not have been the appellants' agents to make such an agreement on the appellants' behalf, the appellants not having been incorporated in Singapore until September 16, 1971. Though the point was not expressly pleaded by the

respondent in his reply, he sought to answer that defence by reliance upon section 35(1) of the Companies Act 1967, as amended, of Singapore.

This being the principal issue between the parties it was agreed between counsel when the trial began before the learned trial judge, that he should be asked to determine two preliminary questions as a matter of law. The first was whether the letter of August 15, 1971, to which their Lordships have already referred, "constituted a pre-incorporation contract between the plaintiff on the one hand and the remaining 11 persons on the other hand, as agents for the defendants, — the defendants having been subsequently incorporated on September 16, 1971". The second was whether, if that letter constituted such a contract, "the said contract was ratified by the defendants by resolutions of the defendants' directors passed on September 26, 1971".

That last-mentioned resolution was the second of twenty-three resolutions passed at the first Board Meeting of the directors of the appellants held in Singapore on September 26, 1971, ten days after the date of the appellants' incorporation. The resolution read thus: —

"2. Resolved that Mr. Khoo Chiang Poh be appointed Managing Director and holds office for life in accordance to the Articles and Memorandum of Association and is responsible to the Board of Directors."

Their Lordships would observe at this juncture that at no time did the respondent aver in his pleadings or in the courts below that the terms of his contract of employment as managing director of the appellants, which must undoubtedly have existed since he served the appellants as managing director until he was subsequently removed by them by resolution dated November 30, 1973, were contained in the resolution of September 26, 1971. Nor was there any reference to that resolution in the text of the first of the two preliminary issues as being the foundation of any contract of employment of the respondent by the appellants.

The learned trial judge decided both those preliminary issues in favour of the appellants. As he recognised, in view of his decision upon the first, strictly the second did not arise. But helpfully he determined both issues. The respondent appealed to the Court of Appeal who answered both questions in the affirmative, thus reversing the decision of the learned trial judge, the restoration of whose judgment the appellants now seek. Though the respondent was represented both before the learned trial judge and in the Court of Appeal he was not represented nor did he appear in person before their Lordships' Board. Learned counsel for the appellants read their Lordships a letter that made it clear that the respondent was well aware of his rights but had decided not to exercise them. In consequence their Lordships have not had the advantage of argument on both sides in a case where there has been a difference of opinion in the courts below and which is by no means susceptible of easy determination.

The appellants' case which was ably argued before their Lordships was, in substance, that which found favour with the learned trial judge, namely that the letter of August 15, 1971 was not a contract of employment between the appellants and the respondent, did not fall within section 35(1) of the Companies Act 1967 (as amended) and in any event was not ratified by the appellants on September 26, 1971. The respondent's contract of employment was, it was contended by the appellants, created on and not before September 26, 1971 by a resolution of that date appointing him managing director for life on the terms of the appellants' Memorandum and Articles of Association. That resolution was not an act of ratification of a pre-incorporation contract contained in the letter of September 15, 1971 but was a new contract on the terms of the Memorandum and Articles of Association.

During learned counsel's submissions on behalf of the appellants their Lordships asked if he knew why the respondent's case had not, at least as a possible alternative, been pleaded and argued in the courts below on the basis of the resolution of September 26, 1971. Learned counsel was uncertain as to the reason but suggested that the respondent's advisers might have feared that so to advance the respondent's case might have enabled the appellants successfully to plead that upon the true construction of the appellants' Memorandum and Articles of Association, and in particular of Articles 96, 101 and 106, to which their Lordships were referred in detail, they were entitled to remove him as they ultimately purported to do by resolution of November 30, 1973 without liability to pay him damages or other compensation for alleged breach of contract. There was some discussion before their Lordships whether upon their true construction this was the effect of those Articles. Since this matter was not raised either in the pleadings or in the preliminary issues and was not therefore considered in the courts below, and since the respondent was not represented before their Lordships, their Lordships express no opinion upon this matter which must await determination if and when it arises.

The full text of the letter of August 15, 1971 is set out in the judgment of the Court of Appeal and their Lordships do not find it necessary again to set it out in full. The most material parts read thus:

"Messrs. H.T. Sam & Co.,
Advocates and Solicitors,
35-B, New Bridge Road,
Singapore.

Re: COSMIC INSURANCE CORPORATION LTD.

We the undersigned, the Promoters of the above proposed Company hereby confirm that the Memorandum & Articles of Association of Cosmic Insurance Corporation Limited shall be thoroughly reviewed and amended by Messrs. H.T. Sam & Co. to suit the requirement of the Companies Act or the Insurance Commissioner and to incorporate same on our behalf with Registrar of Companies.

We confirm that you are given full authority to act on our behalf to seek formal approval from the Commissioner of Insurance to underwrite insurance business of all kinds decided by the Promoters and to finalise whatever necessary documentation and proceedings in connection or related to or incidental to the formation of the Insurance Company under the aforesaid name....

We hereby agree to the following matters discussed at the meeting:

(a) Mr. Khoo Chiang Poh shall be the Managing Director for life unless he resigns, dies or commits an offence

under the Companies Act or is prohibited to become a Director under the Companies Act for any offences;

....

(e) We confirm that the Authorised capital stands at $3,000,000, with the initial pay-up of 1.2 million dollars....

(f) The maximum number of Directors shall be twenty-one (21) who shall be directors for life subject to his removal on account of resignation, death or prohibition or disqualification for being a Director under the Companies Act;

....

(k) the proposed new company shall also establish subsidiary companies, namely:—

...."

Their Lordships apprehend that if this appeal fell to be decided in accordance with the principles established by *Kelner* v. *Baxter*[1] and many subsequent English decisions to the same effect it could not be successfully contended that the appellants were contractually bound by the letter of August 15, 1971. But section 35(1) of the Companies Act 1967, as amended, provides as follows: —

"35.—(1) Any contract or other transaction purporting to be entered into by a company prior to its formation or by any person on behalf of a company prior to its formation may be ratified by the company after its formation and thereupon the company shall become bound by and entitled to the benefit thereof as if it had been in existence at the date of the contract or other transaction and had been a party thereto."

Their Lordships note three things about this subsection. First, so far as presently relevant before section 35(1) can be successfully invoked the alleged "contract or other transaction" must purport to have been entered into "by any person on behalf of a company prior to its formation". Secondly, it is only after that first condition is satisfied that such a contract "may be ratified by the company after its formation...". Thirdly, it is only if both those conditions are satisfied that such a contract upon such ratification is ante-dated to the date when it first purported to have been made.

It was strenuously argued before their Lordships that the letter of August 15, 1971 was not a contract purporting to be entered into on behalf of the appellants. It was urged that its opening words showed that it was intended to be no more than a contract, if it were a contract at all, between the twelve promoters *inter se* who were as individuals giving their solicitors instructions as to the matters to be covered by the Memorandum and Articles of the proposed company. At the most it was a contract between the twelve promoters as to what the Memorandum and Articles should contain. Their Lordships' attention was drawn to the differences between the terms stated in paragraph (a) of the letter and the terms contained in Resolution 2 of the resolutions of September 26, 1971.

Their Lordships do not find it necessary to list those differences in detail. They undoubtedly exist and are clearly relevant to the second preliminary issue — that of ratification. The submission that as a matter of language the letter of August 15, 1971 is not a contract entered into on behalf of the appellants has undoubted force and it was this submission that found favour with the learned trial judge. Clearly section 35(1) is not satisfied by an agreement made only between promoters *inter se* and no-one else.

But as against that submission their Lordships would point out, first, that the letter is headed with the name of the appellants; secondly, the letter makes provision for the amounts both of the authorised and paid-up capital of the appellants and the number of its directors; thirdly, the appellants are to form subsidiary companies for purposes other than those of writing insurance risks; and fourthly, the respondent is to be the managing director. In their Lordships' view it cannot have been envisaged that the respondent would be employed as managing director by the twelve promoters, rather than by the appellants, and to construe paragraph (a) as no more than a promise by those promoters to one of their number that on the incorporation of the appellants they would procure his appointment as managing director of the appellants seems to their Lordships in the context of this letter and especially of the first two paragraphs and the heading itself not to give effect to what seems to be its avowed purpose which was to bind the company in these several respects once it was incorporated.

Their Lordships therefore, in agreement with the Court of Appeal, have reached the conclusion that the letter of August 15, 1971 falls within the relevant part of section 35(1). It follows therefore that the first condition above referred to is in their Lordships' view satisfied.

Their Lordships can deal with the second issue — that of ratification — more briefly. Upon the basis that their Lordships' opinion, upon the first issue, in agreement with that of the Court of Appeal, is correct, the agreement can bind the appellants only if ratification followed. Their Lordships accept that there were differences between the terms of the employment specified in paragraph (a) of the letter of August 15, 1971 and those specified in Resolution 2 of November 26, 1971. But what in their Lordships' opinion was the subject of ratification on the latter occasion was the respondent's appointment as managing director of the appellants. Their Lordships see no difficulty in principle in the ratification of the respondent's appointment being made subject to certain other and more specific conditions than those previously proposed in the letter of August 15, 1971 so as to ensure that the terms of that employment were subject to and in line with the relevant provisions of the Memorandum and Articles of Association. On this issue their Lordships find themselves in respectful agreement with the Court of Appeal.

In the result the appeal will be dismissed with costs. As the Court of Appeal ordered, the hearing before the learned trial judge must continue for the determination of the outstanding matters.

Appeal dismissed.

Solicitors: *Linklaters & Paines.*